IN THE

Supreme Court of the United States

October Term, 1955

No. 233

DIXIE CARRIERS, INC., COYLE LINES INCORPORATED, AMERICAN BARGE LINE COMPANY, FEDERAL BARGE LINES, INC., *Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., *Appellees.*

On Appeal from the United States District Court for the Southern District of Texas

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

STATEMENT

The questions presented by this appeal, the facts of record relevant thereto, and the argument in support of the position taken by the barge line appellants with respect to those questions, are all fairly stated and fully developed in our brief in chief. That brief supplies all reply necessary to most of what appellees say in their briefs (one by the railroad appellees hereinafter referenced "RR", and one by the Interstate Commerce Commission, hereinafter referenced "ICC") on the merits of the involved questions of law and statutory construction. However, some errors

in premises not readily apparent and certain inconsistencies and inaccuracies in legal theories on the part of appellees warrant further brief attention.

I.

The Section 3(4) Issues Based Both on the Differences in Through Route and Joint Rate Arrangements and on the Local Rate as Compared With Less Compensation for the Same Services in the Form of an All-Rail Division, Have Been Pressed by Appellants at All Stages of the Proceeding From the Filing of the Complaint With the Commission (R. 62)

Appellees contend over and over again in their briefs that the section 3(4) issues stated in the heading were not raised by the complaint to the Commission or, if raised, were waived at the oral argument. (ICC 11, 17-18, 31, 52, 53-54; RR 4, 5, 9-11, 13, 16, 30-32). More effort, by far, is expended in urging the Court *not* to rule on the question of whether a division under the circumstances of this case is a "rate" or a "charge" within the meaning of section 3(4), than in assisting the Court to come to a sound conclusion on the merits of that question.[1]

By way of reply, it is perhaps sufficient to point out that the Commission treated the issues as properly before it and rested its dismissal of appellants' complaint on a construction of the statute which was challenged in the lower court [R. 58, paragraph 1(b)], and is challenged in this Court. A reviewing court

[1] In the Commission's brief of 65 pages only pages 52 to 62, and in the railroad brief of 38 pages only pages 32 and 33, deal with the merits of the question.

will test the validity of an order of an administrative agency by the grounds on which it is based. *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U.S. 80, 87 (1942).

Furthermore, the issues as stated in the above heading were argued on the merits before the Commission by counsel for appellants (R. 121, 123, 124-126, 126-129, 132-133) and also by counsel for the railroad appellees (R. 143). At no stage of the proceeding did the railroad appellees urge that the complaint to the Commission was insufficient to raise the issues of section 3(4) discrimination here pressed by appellants. Rather, they contended before the Commission, as they do here, that the division of the all-rail rates was not pertinent to the section 3(4) issue on the ground that there were in existence no through routes between the railroads and the barge lines as to sulphur from Galveston to Danville. (R. 143).

The alleged waiver is based on a colloquy between Commissioner Alldredge and counsel for one of the appellants during his rebuttal argument, which is quoted in full at page 15 of appellants' brief.[2] As to the relief requested, counsel stated the request of the barge lines for joint rates to cure the discrimination.

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[2] When that colloquy is referred to in the brief of the Commission, only selected phrases are quoted. (ICC 18, 53). When quoted in the brief of the railroad appellees, the last inquiry by Commissioner Alldredge and counsel's reply thereto are omitted. (RR. 9). The counsel mentioned spoke only for Federal Barge Lines, Inc. (R. 122).

He also stated that the complaint to the Commission contained a general prayer "for such other relief as may seem proper" (R. 147-148). Under that prayer the Commission could cure the discrimination shown by prescribing a proportional rate on ex-barge sulphur equal to the division which the railroad appellees accept out of the all rail joint rate. Section 6(11)(b) of the Interstate Commerce Act[3] confers a specific power on the Commission to prescribe proportional rates lower than local rates on ex-water traffic of common carriers by water. The fact that Section 6(11)(b) was not specifically mentioned in the complaint does not lessen the authority of the Commission to exercise the power there conferred when appropriate to its administration of the substantive provisions of the Interstate Commerce Act. *Chicago R. I. & P. R. Co.* v. *United States*, 274 U.S. 29, 36-37 (1927).

The phrase used by counsel, "issues in our complaint", when replying to an inquiry as to the form of the relief sought obviously was inept. However, the context makes plain that his response meant "That

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[3] Section 6(11)(b) of the Interstate Commerce Act (49 U.S.C. 6(11)(b)) empowers the Commission as to traffic transported by common carriers by water in interstate commerce:

"To establish proportional rates, or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water."

is not the specific relief requested." In any event, counsel's statement cannot possibly be construed as waiving *any* issue as to the fact of discrimination or how caused, even as to Federal Barge Lines, Inc., for whom he spoke.

II.

The Commission Has the Authority to Require the Railroad Appellees to Join Appellants in Through Routes and Joint Rates in Order to Cure Section 3(4) Discrimination in Rates and Charges, Even If There Were No Proof of Public Interest to Support Independent Action Under Sections 15(3) or 307(b)

All appellees contend that the Commission has *no* power to compel through routes and joint rates, *differential or otherwise*, to cure discrimination under section 3(4) and that it has power to compel such routes or rates only upon findings of public interest under sections 15(3) and 307(d). (ICC 10-11, 23-26; RR 15-16, 18) They further assert that the prohibition in section 3(4) does not relate to disparate treatment in the absence of existing through routes and, since no through routes presently exist between appellants and the railroad appellees that there can be no violation of that section (ICC 30, 33; RR 16, 27, 29). The railroad appellees say that all cases relied upon by appellants which involved discrimination in charges show that there were existing through routes (RR 27).

The latter claim is shown to be false and the arguments of counsel for the Commission on the point are shown to be contrary to the Commission's own past administration of the Interstate Commerce Act by the cases summarized on pages 32-39 of the Commission

Brief. The point under discussion is purely a ques
tion of law. It relates solely to the power of the Com
mission to enforce the prohibition of discrimination
contained in section 3(4), independently of its powe
to prescribe through routes and joint rates upon
showing of public interest under sections 15(3) an
307(d). As is acknowledged in the Commission'
brief, its power to enforce section 3(4), despite the lac
of existing through routes with the complaining car
rier, was exercised in *Denver & Rio Grande RR Co.* v
Union Pacific RR Co., et al., 287 I.C.C. 611 (1953)
Decatur Navigation Company v. *Louisville & Nash*
ville Railroad Company, et al., 31 I.C.C. 281, (1914)
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(1918). In *Chicago, Indianapolis, & Louisville Rail*
way Company, et al. v. *U. S.*, 270 U.S. 287, 292-29
(1926), this Court sustained the Commission's powe
to cure discrimination in violation of section 3(4
when exercised independently of the powers conferre
on it by other sections of the Interstate Commerce Act

The power can be no different in the instant case. The cases cannot be distinguished on the evidence since the question is only as to the Commission's power when proceeding wholly under section 3(4).

If appellees were right as to the lack of power to enforce section 3(4) in the absence of findings of public interest under sections 15(3) and 307(d), then section 3(4) would become a meaningless enactment. Thus in the opinion of appellants it is not necessary here to reach the question of whether or not there is in existence a "through route" via the lines of appellant barge lines and appellee railroads, within the meaning of the Act. Were it necessary to reach that point, however, the record clearly establishes the existence of a "through route" as defined by this Court in *Thompson* v. *United States*, 343 U.S. 549, 557 (1951), where it said "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service". Here the record is clear that the local rate of the appellees applicable on sulphur delivered to them at East St. Louis, Illinois, for movement to Danville, Illinois, is an interstate rate, which presupposes that the traffic must come from beyond East St. Louis, and which was referred to by a witness for the appellees as "a proportional rate, so to speak" (R. 103). Certainly in view of that situation the appellees may not now contend that they do not at present hold themselves out to handle through traffic interchanged to them by the appellants.

III.

The Circumstances and Conditions to be Considered in Testing the Lawfulness of the Difference in Treatment Alleged to be in Violation of Section 3(4) are Limited to Those Which Relate to the Services of the Railroad Appellees From East St. Louis to Danville

Counsel for the Commission seek to justify the discrimination of which appellants complain on the ground that the all-rail routes from sulphur mines in Texas have an "inherent advantage" because the haul is direct to Danville without transfer of lading whereas the barge-rail route starts at Galveston with sulphur which has had an antecedent rail haul from a sulphur mine and that route requires a transfer of lading at East St. Louis (ICC 45-47). In their Summary of Argument, counsel say (ICC 15):

> . . . The Commission considered such circumstances and found that the National Transportation Policy did not require it to compel the railroads that originate the traffic, to relinquish their long haul (over 1,000 miles) to the barge lines and accept instead a short haul of only 240 miles (60 miles from the mines to Galveston and 180 miles from East St. Louis to Danville) in favor of a barge haul of 1,400 miles from Galveston to East St. Louis over a circuitous route.

The reports of the Commission do not contain, even by implication, any finding like that claimed.[4] The only reference to "inherent advantage" is in the report of Division 3 (R. 31) affirmed by the Commission. The actual finding is that the depressed char-

[4] Quoted in appellants' brief, pp. 32-33; ICC brief, p. 47.

acter of the $2.95 local rail rates from East St. Louis to Danville excuses the refusal of the railroad appellees to accept less than that amount for their services in transporting barge-rail sulphur. The depressed character of that rate cannot, as a matter of law, excuse the refusal of the railroad to treat appellants as favorably as they treat their rail connections. (Appellants' brief, pp. 32-34)

If the Commission had based its decision on the premises stated by its counsel, it would have committed an additional error. The defendants in the Commission proceeding participate in the involved all-rail routes *only* from East St. Louis; they do not reach the sulphur mines or Galveston and do not participate in the hauls therefrom to East St. Louis. If they may lawfully treat barge line connections less favorable than they treat their rail connections, it must be because of differing circumstances *on their own lines*, and not because of circumstances on the lines of their connections. *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, 581 (1946).

Counsel in asserting that protection of the "long-haul" of the railroads was a controlling factor in the Commission's decision has apparently overlooked the fact that the railroad appellees have no line between the termini of Galveston and Danville except their rails from East St. Louis to Danville. Counsel also apparently overlooked the law on the point, that is, the exception to the prohibition against short-hauling con-

tained in section 15(4) of the Interstate Commerce Act which reads as follows:

> Section 15(4).
>
> "* * * In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, . . .

IV.

The East St. Louis—Danville Services of the Railroad Appellees are the Same When Sulphur Is Received From Barge Line Connections as When Received From Railroad Connections

The railroad appellees assert a lack of supporting evidence of record for the statement by appellants that the services rendered by those appellees is the same on ex-barge sulphur received by them at East St. Louis, as on ex-rail (RR 4, 14, 30). The Commission acknowledges a "similar service" in stating its question No. 3 (ICC 2, this question being as to the division vs. a local rate) but does not note that circumstance when discussing discrimination caused by the through route and joint rate arrangements with railroad connections but not with the appellants (ICC 2, 21, 22).

That the services are the same is not open to doubt. The barge line rate of $5.32, the water factor in the

present barge-rail combination through rate, is published as an "inclusive" rate and covers the transfer of the sulphur from barge to cars and the absorption of the charge for switching the traffic from the barge terminal to interchange with the railroad appellees at East St. Louis (R. 83, 84). If a joint rate is established, the transfer and that charge will be absorbed out of the barge line division (R. 84). The rail service from interchange at East St. Louis to Danville and delivery at that point could not possibly differ according to the mode of transportation used up to East St. Louis.

Both Division 3 (R. 24) and the Entire Commission (R. 30) noted that the costs incident to placing the traffic on the rails at East St. Louis would be absorbed by the barge lines.

At the oral argument before the Commission, counsel for appellants said (R. 129):

> "Now, as to the service, there is no dispute on this record that the service is identical, whether it is brought to East St. Louis by the barge line or whether it is brought to East St. Louis by the Missouri Pacific Lines, from Galveston or New Gulf, Texas."

Counsel for the railroad appellees took no issue in his argument with that statement (R. 136-144).

V.

The Mechling Case Is Not Distinguishable on the Facts

Contrary to the claims of appellees (ICC 16, 40, 44-45, 60; RR 23, 24, 35-36) the decree affirmed in the *Mechling* case, *supra*, required, in part, separately established rates on ex-barge grain *equal* to the divisions east of Chicago out of all-rail one-factor joint through rates *from the same origins*—those in Illinois. (Appellants' Brief, pp. 46-49). If that were not so, why did counsel for the Commission in its brief in that case in this Court oppose the use of all-rail divisions as the standard of lawfulness for the separately established rate on ex-barge grain from Illinois origins?

Appellees assert that the grain involved in the *Mechling* case moved over through routes at through rates on through bills of lading (ICC 40, 45; RR 23, 35). That was not true as to the ex-barge grain. The barge transportation to Chicago was port-to-port service not subject to the Interstate Commerce Act when the case before the Commission started in 1939. Then, and also after the enactment in 1940 of Part III of the Act which brought port-to-port service under regulation, the barge grain was destined only to Chicago and went into storage at that point. That was also true as to all ex-lake grain and as to a large portion of the all-rail grain. This Court has held that under such circumstances neither through rates nor through routes exist. (*A.T. & S.F. Ry. Co. v. U.S.*, 279 U.S. 768, 777, 779).

This Court applied section 3(4) in the *Mechling* case to compel rates on ex-barge grain the same as the charges on ex-rail and ex-lake grain, despite the fact that there were no formal existing through routes between either the barge lines or the preferred lake carriers and the rail lines as to grain destined to Chicago and stopped there for storage or processing. The fact that some all-rail grain moved in continuous through service at through rates and over through routes was rejected by this Court as without legal relevancy.

Respectfully submitted.

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Proof of Service

In compliance with the applicable provisions of the Revised Rules of the Supreme Court of the United States, I, Donald Macleay, one of the attorneys for the several appellants on whose behalf the foregoing Reply Brief of Appellants is submitted, and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing document on counsel for the several parties to this proceeding, as follows:

1. On the United States of America by mailing copies in duly addressed envelopes with first class postage prepaid to:

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This, the 22nd day of March, 1956.

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